

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

Second Appeal No. 453 of 2015

Kashinath Namdeo Shinde
And Others.

.. Appellants.

Versus

Bapu S/o Janardhan Shinde
Since deceased through legal
representatives And Others.

.. Respondents.

Smt. Anjali Bajpai Dube, Advocate, for appellants.

Shri. A.K. Gawali, Advocate, for respondent Nos.1A to 1D.

With

Second Appeal No. 747 of 2010

With

Civil Application No.16601 of 2010

Bapu S/o Janardhan Shinde
Since deceased through legal
representatives
And Others.

.. Appellants.

Versus

Kashinath Namdeo Shinde
And Others.

.. Respondents.

Shri. Amol K. Gawali, Advocate, for appellants.

Smt. Anjali Bajpai Dube, Advocate, for respondent
Nos.1,3,5 to 9.

CORAM: T.V. NALAWADE, J.

DATE : 14th SEPTEMBER 2015

ORDER:

1) Regular Civil Suit No.224/1989 was filed by the appellants of Second Appeal No.453 of 2015. Decree of partition and separation possession was given in their favour by the trial Court. Though to some extent the decision of the trial Court had gone against the plaintiffs, decision of the trial Court was not challenged by the plaintiffs and it was challenged by defendant Nos.1 to 5 by filing Regular Civil Appeal No.115 of 2005 in the Court of District Judge Ahmednagar. This appeal came to be dismissed and so Second Appeal No.747 of 2010 is filed by the original defendants. Both the sides are heard.

2) The Courts below have held that the defendants have failed to prove the execution of Will and they have also failed to explain suspicious circumstances surrounding the Will and so in respect of the properties mentioned in the Will the decree of partition and separate possession is given in favour of the plaintiff. One

Sawaleram was the ancestor of both the plaintiffs and the defendants and he had three sons viz. Namdeo, Janardhan and Satwaji. The plaintiffs are the successors of Namdeo. Defendant Nos. 1 to 5 are successors of Janardhan. Satwaji died issueless though he left his widow Anusaya. It is the case of the defendants that partition had taken place amongst these 3 brothers and Anusaya bequeathed the property which had come to the share of Satwaji to defendant Nos.1 to 5. The case of the plaintiffs that there was no partition is not accepted by the Courts below and so the dispute revolves around the so called Will shown to be executed by Anusayabai.

3) For the defendants it is submitted that substantial questions of law can be formulated on the basis of grounds (A) to (G) mentioned in appeal memo. Grounds (A) to (G) are as under :-

(A) When the plaintiff has not prayed for a declaration that they should be declared owners of $\frac{1}{2}$ share of the property standing in the name of deceased Anusaya, whether the Court has jurisdiction to grant a relief, which was never prayed for in the plaint?

(B) Whether in view of the proviso to Section 34 of the Specific Relief Act, the Court has jurisdiction to grant a declaration that plaintiff had $\frac{1}{2}$ share in the property of Anusaya along with original Defendant Nos.1 to 5, when in spite of the fact that, defendant Nos.1 to 5 were in possession of the land standing in the name of Anusaya, plaintiff had not prayed for the consequential relief of possession of the suit property to be handed over to them?

(C) When the decree prayed for is joint and undividable, and the suit had abated against original Defendant No.5, as his legal heirs were not brought on record, whether such decree can be passed by the learned Lower Court?

(D) When there is nothing on record to suggest that Anusayabai was suffering from illness, at the time of execution of Will i.e. 24/11/1987, and by examining the scribe and the attesting witness, the Will has been duly proved, whether the same can be discarded only by reasons that there was no certificate given by a Doctor that the testator of the Will was having physical and mental capacity to execute the Will?

(E) When the scribe and the attesting witness have been examined to prove the will and their evidence is unshattered, whether their evidence can be discarded by the Court by holding that the Will is not proved by reasons, that the witnesses examined were closely related to the testator and

no independent witness was examined to prove the Will?

(F) Whether non-registration of Will before the death of testator would render the Will invalid or the execution of the same can be proved by adducing oral and documentary evidence?

(G) Whether in absence of any Decree, passed by the Civil Judge Junior Division, Shrigonda, declaring that the Will Deed dated 24.11.1987 is null and void, whether the learned Lower Court were correct in granting a declaration that the present Respondent Nos.1 to 4 i.e. original plaintiff were entitled to $\frac{1}{2}$ share in the property of deceased Anusaya?

4) The defendants have examined defendant No.1 Bapu, the propounder of Will. In his evidence he has deposed that the Will was scribed by Suresh Shinde, it was signed by attesting witness like Babasaheb Temekar and Ganpat Waghmare and the Will was executed by the testator at Devdaithane.

5) Attesting witness Babasaheb Temekar is examined for proving the execution of the will. He is maternal uncle of defendant Nos.1 to 5 and the deceased

Anusayabai, the testatrix, was his real sister. He has given evidence that on 24-11-1987 Anusaya narrated the contents of the Will and she put her thumb impression on the Will and Suresh Shinde put his signature to identify the thumb impression. He has deposed that after putting of the thumb impression by Anusaya he and other witnesses put their signatures on the Will. In the cross examination he has admitted that the contents of the Will were dictated by Suresh Shinde who is son of one defendant. Though attempt is made to show that Suresh Shinde scribed the Will, it is a typed document. The attesting witness and also Suresh do not know as to who typed the Will.

6) Suresh, so called scribe, has given evidence that as per the dictation given by Anusaya, he prepared the draft and he got typed the Will on the basis of the draft. He has deposed that he read over the contents of the Will to Anusaya and then he gave his signature against the thumb impression of Anusaya to identify. Suresh could not give the name of the person who typed the Will. So called draft which must have been prepared for typing the

matter is not produced. Anusaya was illiterate lady. Copy of Will produced on the record does not show that the thumb impression of Anusaya was identified by anybody. Date of execution is shown as 24-11-1987 but it was produced after 2 months of the execution for registration in the office of Sub Registrar. Anusaya died after about one month of date of execution. Her age is given as 60 years in the Will.

7) The trial Court and the first appellate Court have held that due execution of the Will is not proved and the suspicious circumstances surrounding the Will are not explained. Both the sides cited many reported cases on the points involved.

8) In view of the rival contentions and nature of evidence given, provisions of Section 59 and 63 of the Succession Act need to be used in addition to using section 68 of the Evidence Act.

9) Section 63 of the Indian Succession Act relates to due execution of will and it runs as under :-

“63. Execution of unprivileged Wills.-- Every testator, not being a soldier employed in an expedition or engaged in actual warfare or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules :--

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has been some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

10) Section 68 of the Indian Evidence Act, 1872 runs as under :

“68. Proof of execution of document required by law to be attested.-- If a document is required by law

to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.”

Section 59 of the Indian Succession Act runs as under :-

“59. Person capable of making Wills.-- Every person of sound mind not being a minor may dispose of his property by Will.

Explanation 1.-- A married woman may dispose by Will of nay property which she could alienate by her own act during her life.

Explanation 2.-- Persons who are deaf or dumb or blind are not thereby incapacitated for making a Will if they are able to know what they do by it.

Explanation 3.-- A person who is ordinarily insane may make a Will during interval in which he is of sound mind.

Explanation 4.-- No person can make a Will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.

Illustrations

(i) A can perceive what is going on in his immediate neighbourhood, and can answer familiar questions, but has not a competent understanding as to the nature of his property, or the persons who are of kindred to him, or in whose favour it would be proper that he should make his Will. A cannot make a valid Will.

(ii) A executes an instrument purporting to be his will, but he does not understand the nature of the instrument, nor the effect of its provisions. This instrument is not a valid Will.

(iii) A, being very feeble and debilitated, but capable of exercising a judgment as to the proper mode of disposing of his property, makes a Will. This is a valid Will."

11) Whether Will is surrounded by suspicious circumstances is essentially a question of fact. Similarly, competency of the testator is also question of fact. The suspicious circumstances surrounding the Will can be with regard to due execution of Will or they may be with regard to the competency of the testator as mentioned in section 59 of the Succession Act. When the case fails on the

ground of due execution of the Will as mentioned in section 63 of the Succession Act, the remaining exercise becomes unwarranted. So, the evidence needs to be considered and appreciated from that angle.

12) The discussion made by the trial Court and the submissions made show that both the witnesses examined by the defendants like attesting witness and scribe were highly interested witnesses. There are circumstances like the witnesses have not given the name of the person who typed the Will, the typist is not examined and the draft which must have been prepared for getting typed the Will is not produced. In view of these circumstances and the fact that the original Will was not produced, it is difficult to accept that the contents of the Will were proved. Even the thumb impression of the testatrix was not identified though there is such contention. The Will was presented for registration after death of the testatrix. Though such presentation is possible as per section 40 of the Registration Act, these circumstances create doubt about due execution of the Will. Due to such nature of evidence, the evidence is not sufficient to prove due execution of

Will and the circumstance that it was registered subsequently is of no help to the defendants. When death took place within 30 days of the so called execution and the age of the testatrix was shown as 60 years, no explanation is given as to how she died within such short span. This again creates suspicion about due execution of the will.

13) The question of existence or absence of suspicious circumstances is the question of fact. Similarly competency of the testator is question of fact. On these points there are concurrent findings of the Courts below. As due execution itself is not proved, there is no need to consider other circumstances. In view of these circumstances, this Court holds that it is not possible to formulate the substantial questions of law on the aforesaid grounds.

14) It was a suit for partition by successors under Hindu law and also in view of admitted relationship there was no need of relief of declaration of right. the burden to prove will was on defendants and so there was no need to

claim relief of declaration against the will. The suit was between two branches of successors and so, each branch could have been represented by one successor of the branch and each branch can get 1/2 share as per Hindu law. The burden of proof of will was on propounder and for that reason also suit did not abate due to death of one propounder.

15) For both the sides reliance was placed on many reported cases. Learned counsel Shri. A.K. Gawali for the original defendants has placed reliance on the following cases :-

- (1) **2010 (1) Mh.L.J. 701 (Lalita v. Kirti).**
- (2) **2011 (5) ALL MR 497 (Dr. Feroze Homi Duggan v. Jean Duggan).**
- (3) **2013 (4) ALL MR 600 (Manilal Sunderji Doshi v. Kamal Manilal Doshi).**
- (4) **2005 (5) ALL MR 166 (S.C.) (Daulat Ram v. Sodha).**
- (5) **2014 (1) ALL MR 359 (Daya Subhash Tiwari v. Kashinath Lalta Tiwari).**
- (6) **LAWS(DLH)-2002-10-26/ILRDLH-2003-11-185 (Santosh Dayal v. State of Delhi).**
- (7) **2009(5) Mh.L.J. 837 (Max Cajeton v. I. Fernandes).**

16) Learned counsel Smt. Anjali Bajpai Dube for the original plaintiffs has placed reliance on the following cases :-

(1) **(2006) 12 SCC 369 (Om Prakash v. Shiv Kumar).**

(2) **(1998) 4 SCC 384 (Gurdial Kaur v. Kartar Kaur).**

The facts and circumstances of each and every case are always different.

17) In one case the evidence may be there to comply the requirement of provision of section 63 of the Succession Act but in other case evidence may not be sufficient. Further due weight needs to be given to the appreciation of the evidence. Such exercise is done by the trial Court who had best opportunity to appreciate the things. Thus in such case the facts and circumstances need to be considered separately and it needs to be appreciated as to whether the due execution is proved and whether suspicious circumstances surrounding the will exist or they are explained by the propounder of the will. In view of the discussion already made, this Court holds

that the appeal cannot be admitted as no substantial question of law can be formulated on the aforesaid circumstances.

18) In the result, both the appeals stand dismissed.
Civil application stands disposed of.

Sd/-
(T.V. NALAWADE, J.)

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